No. 90-189

In The

Supreme Court of the United States

October Term, 1990

MICHIGAN,

Petitioner,

v.

NOLAN K. LUCAS,

Respondent.

On Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF FOR RESPONDENT

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COUNTER STATEMENT OF THE QUESTION PRESENTED

WHETHER MR. LUCAS WAS DENIED HIS SIXTH AMENDMENT RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT WITNESSES, WHERE HE WAS PRECLUDED FROM PRESENTING EVIDENCE OF A LONG TERM SEXUAL RELATIONSHIP WITH THE COMPLAINANT BECAUSE HIS ATTORNEY FAILED TO COMPLY WITH THE NOTICE PROVISIONS CONTAINED IN THE RAPE SHIELD LAW.

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COUNTER STATEMENT OF THE CASE

On September 5, 1984, a warrant authorizing the arrest of defendant was issued, charging him with two counts of first degree criminal sexual conduct, count one being fellatio and count two being sexual intercourse with the use of force, contrary to MCL 750.520(B)(1); MSA 28.788(2)(1).

A bench trial was conducted before a Wayne County Circuit Judge and on May 15, 1985, Nolan Lucas was found guilty of "criminal sexual conduct in the third degree, on both counts". (R. 262, 266) On July 2, 1985, Mr. Lucas was sentenced to the Michigan Department of Corrections for confinement between 44 to 180 months. (R. 285)

HISTORY OF PARTIES' RELATIONSHIP

Wanda Brown, the complainant, and Nolan K. Lucas initially met in late March or early April, 1984. (R. Prem. Exam. 21) By August 31, 1984, the date of the alleged rape, Ms. Brown described the relationship between her and Mr. Lucas as being "boyfriend and girlfriend", and that they had been "dating one another for six or seven months". (R. Prem. Exam. 4) Both lived on Rhode Island Street in the City of Highland Park, Michigan, only a couple of blocks from one another. (R. Prem. Exam. 4) Ms. Brown visited Mr. Lucas in his house four or five times per week during the course of the relationship and saw each other nearly every day. (R. 62) In fact, during the course of their relationship, Ms. Brown visited Mr. Lucas' home over 100 times. (R. Prem. Exam. 23)

At the preliminary examination, Ms. Brown testified that she and Mr. Lucas had sex over one hundred (100) times. (R. Prem. Exam. 23)[1]

Ms. Brown further testified that at different times in the relationship, she had both "conventional, straight penil-vaginal sex, as well as oral sex". (R. Prem. Exam. 23) Defense counsel further inquired as to the sexual relationship of the parties as follows:

> Q. And when we say oral sex at different times, would that involve you performing fellatio on him and him performing cunnilingus on you or what?
>
> A. Yes.
>
> Q. Such experiences, you would indicate you probably had with my client, how many times?
>
> A. I don't know.
>
> Q. More than you can remember.
>
> A. No.
>
> Q. Okay, how many times?

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[1] The Michigan Rape Shield Act, MCL 750.520(j); MSA 28.788(10) as most rape shield laws, prohibit the use of a victim's prior sexual experiences, except for certain limited conditions. However, the Michigan statute does not specifically indicate whether it applies to preliminary examinations. In fact, it could be strongly argued that it applies only at the time of trial for the reason that any effort to introduce said evidence must be done, according to the statute, within ten days of the arraignment on the information (which is well after the preliminary examination) or if newly discovered during the trial, an *in camera* hearing may be held to determine admissibility. Since there was no objection to the cross-examination as to the complainant's prior sexual relationship with the defendant, the district court judge permitted defense counsel to engage in extensive cross-examination of the prior sexual relationship between the parties, and further permitted the defendant, at this hearing, to specifically testify as to the parties' prior sexual relationship.

> A. I don't know, over a hundred times I guess. It was a lot of times. (R. Prem. Exam. 23)

According to Ms. Brown, the parties had a serious relationship and talked about marrying one another. (R. Prem. Exam. 24) Moreover, at the preliminary examination, Mr. Lucas also confirmed the parties' long term sexual relationship.[2]

On direct examination of Mr. Lucas, defense counsel continued as follows:

> Q. I see, okay. Now, you have heard the testimony of the complaining witness, who suggested that such sex – strike that, did you have sexual intercourse with Wanda Brown on the evening of August 31, 1984?
>
> A. Yes, I did.
>
> Q. Did you have it with her based on mutual consent, freely and voluntarily or did you force her to have sex with you?
>
> A. No, sir. It was the same way it had been just about every night before then, freely.
>
> Q. How many times would you say, that you had sexual interaction with Wanda Brown?
>
> A. Since we've met?
>
> Q. Yep.
>
> A. Approximately, every other day, since we've known each other, as a matter of fact, the

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[2] Defense counsel took the very unusual step to put Mr. Lucas on the stand at the preliminary examination. In Michigan, this is rare, for this is in effect only a "probable cause hearing" and if there is any factual dispute, whatsoever, the matter is normally bound over to the higher court. However, by placing Mr. Lucas on the stand at that time, which was the earliest stage in the proceeding, the prosecution was provided with the defense strategy and specific notice of defendant's defense in this matter, that being consent.

first day we met each other, we had sex that night by my fireplace.

* * *

Q. Have you ever had to coerce Wanda Brown into having sex with you?

A. If I maybe (sic) so bold, sir, most of the time, it was her that was doing the coercing. (R. Prem. Exam. 62, 63)

The parties continued in this serious sexual relationship until about two weeks before the incident, which was on August 31, 1984. (R. 11) Ms. Brown indicated that she was fond of Mr. Lucas, that she liked him and cared for him. (R. 66) Although Ms. Brown indicated that two weeks prior to the incident, the parties became "estranged", they nevertheless continued to speak. (R. 66) During this period of estrangement, Ms. Brown continued to visit Mr. Lucas, on his invitation. (R. Prem. Exam. 43) In addition, Mr. Lucas testified that at one point, they were very close and that he intended to marry Wanda Brown. (R. 164, 166, 216) In fact, Mr. Lucas testified that he asked Ms. Brown's mother for permission to marry her. (R. 167)

THE INCIDENT AND TRIAL

The trial in this matter commenced on May 14, 1985.[3] (R. 3) Prior to the commencement of trial. Gail Williams,

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[3] The chronology of events leading to trial is relevant. The notice provision of the Michigan Rape Shield law is triggered "within ten days of the arraignment on the information". MCL 750.520(j)(2); MSA 28.788(10)(2) According to the "case inquiry", a computer generated document indicating every single transaction and corresponding date, item no. 5 indicates that on September 14, 1984, the defendant retained his own

(Continued on following page)

defendant's newly appointed attorney, asked that she be permitted to present testimony concerning the prior sexual intercourse between Mr. Lucas and Ms. Brown, the complainant. (R. 3) Defense counsel made two points in support of her motion. First, she indicated that she was appointed as counsel for the defendant past the time that the motion could have been made.[4] (R. 3) Her second

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counsel, Kenneth V. Cockrel. Item No. 8 indicates that on September 18, 1984, the preliminary examination was conducted and the defendant was bound over for trial as charged. Items 14 and 15 are curious in that they indicate that on October 25, 1984, the arraignment on the information occurred and the defendant pled not guilty (Item 15). However, Item 14 indicates that on October 25, 1984, there was a substitution of attorney filed or indicated on the record by defendant's retained counsel, Kenneth Cockrel. This is relevant for the reason that the retained counsel stated that he was no longer going to be representing defendant after the arraignment on the information. However, on November 8, 1984 (Item 16), it was noted that there was a substitution of attorney by Kenneth Cockrel. Item 24 indicates that on January 21, 1985, the matter was assigned for trial with the attorney being Gail Williams. However, a substitution of attorney (Item 21) was not formally entered until February 8, 1985 by Ms. Williams. The significance of these dates is that there was a serious question as to whether the defendant in this matter was actually represented by counsel during the critical notice time period. It is clear that the state did not appoint new counsel until well after the ten day period had elapsed. What is not entirely clear is when Mr. Cockrel substituted out of the case. At least from this case inquiry, which is part of the record, the court computer indicates that the substitution occurred as early as October 25, 1985, the date of the arraignment on the information.

[4] On this point, defense counsel is technically correct since the rape shield statute, MCL 750.520(j); MSA 28.788(10) only

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point was that the defense of defendant was based upon the relationship (including sexual relationship) he had with the complainant over a very long period of time. (R. 3)

The trial prosecutor objected saying that the statute prohibited the bringing of the motion at the time of trial and referred to the statute which requires the motion to be filed within ten days of the arraignment on the information. (R. 4) In response to defense counsel's motion, the court stated:

> None of the requirements set forth in (MCL) 750.520(j), subsection 2, have been complied with; and among others, other than filing ten days after the arraignment on the information, that is, the court should have an *in camera* hearing on the evidence which has not been done. Unless this information is filed or discovered during the course of trial, I would have no right to go into that, but your motion is respectfully denied. (R. 6)

After being denied the motion, defendant thereafter waived his right to a jury trial and decided to proceed with a bench trial only. (R. 7-8)

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allows two time periods in which to seek to raise this issue. First, the defendant must bring the motion "within ten days after the arraignment on the information", and second, if new information is discovered *during the course of the trial*, the court may conduct a separate hearing to determine admissibility. Defense counsel having known about the defense prior to trial, but after the expiration of the ten days, could not have technically made this motion. If defense counsel had made the motion, then the prosecutor would have opposed it for the reason that it was not timely as prescribed by the statute. On the other hand, if the prosecutor did not oppose it as being untimely, then the prosecutor would be conceding that the notice requirement as prescribed by the statute can be flexible.

Wanda Brown testified that on August 31, 1984 at approximately 9:45 p.m., she received a telephone call from Mr. Lucas wherein he indicated that he wanted her to come to his home to watch cable television. (R. Prem. Exam. 5) She further testified that "I didn't accept at that point, I told him that I needed cigarettes and that if he could wait until I got back from the gas station, that I would come down." (R. Prem. Exam. 19) About five or ten minutes later, she left her home and began walking toward a Marathon gas station for the purpose of purchasing the cigarettes. (R. 20) As she was walking by or near Mr. Lucas' home, he called her from his porch. (R. Prem. Exam. 24) She was across the street from his house, and at that point, she proceeded to cross the street to meet him. (R. Prem. Exam. 24) She then stated to Mr. Lucas, "[a]re you going to walk with me," assuming that he was going to accompany her to the gas station to get the cigarettes. (R. Prem. Exam. 24, 25) He indicated that he did not want to walk with her to the gas station and she stated, "Well, he was my boyfriend – I just wanted him to walk to the gas station with me, whether he wanted to or not made me no difference." (R. Prem. Exam. 25)

At that point, Ms. Brown then testified that Mr. Lucas grabbed her arm, showed her a knife and told her that she was coming with him to his house. (R. 15)

Once into the house, he made her disrobe in the dining room. (R. 17) At that point, Ms. Brown testified that Mr. Lucas appeared angry because she was apparently seeing someone else. (R. 18, 19) He had taken the contents of her purse and dumped it on the table, apparently looking for information regarding another boyfriend. (R. 19)

Thereafter, according to Ms. Brown, the defendant had her go into the living room and sit on the couch, still unclothed. (R. 19) She then testified that the defendant left the room and got a bottle of wine and poured it into two glasses, still trying to inquire about her other lover, purportedly named "Ricky". (R. 19)

Thereafter, with a knife displayed, Ms. Brown testified that she was forced to perform both oral and vaginal sex. (R. 17, 19, 30, 32) Ms. Brown further testified that she was required to stay in the house for an approximate 24 hour period. (R. 39)

During this 24 hours period, Mr. Lucas left Ms. Brown alone at least three times when he went to the cellar for more wine. (R. 76) Additionally, Mr. Lucas, according to the testimony of Ms. Brown "went upstairs" more than five times. (R. Prem. Exam. 31)[5] Thereafter, Mr. Lucas and Ms. Brown went to sleep on a sofa couch (R. Prem. Exam. 36) and awoke the following morning at approximately 10:00 a.m. (R. Prem. Exam. 37)

During the course of the 24 hour period, Ms. Brown testified that she was struck by Mr. Lucas in her right eye. (R. 29) Although Ms. Brown testified at the preliminary

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[5] Ms. Brown's credibility was a significant issue in this case. For instance, she testified at the preliminary examination that Mr. Lucas went upstairs more than five times (R. Prem. Exam. 31) but at trial, she indicated that he only went upstairs once. (R. 78) More significantly, at trial, Ms. Brown testified that she could never remember how many times Mr. Lucas hit her (R. 184), but then she recalled he hit more than a few times. (R. 105) However, at the preliminary examination, she testified that he hit her 50 to 100 times. (R. Prem. Exam. 31) This is relevant to the extent that if the prior sexual relationship evidence had been available to the fact finder, defendant's trial counsel could have been able to tie these inconsistencies into a common theme.

examination that she was struck between 50 and 100 times, (R. Prem. Exam. 31) she did not visit her doctor until four days later. (R. Prem. Exam. 32) Ms. Brown saw a doctor because the officer in charge of the case advised her to do so. (R. 148)

Ms. Brown testified that throughout this 24 hour period, Mr. Lucas had made his pocket knife visible. (R. 32, 33) Further, Mr. Lucas was very angry about a person named "Ricky", whom defendant suspected of being Ms. Brown's new lover. (R. 18, 19, 34)

Mr. Lucas testified on his own behalf. He confirmed that the parties had a very close relationship. (R. 164) He further testified that he had considered marrying Ms. Brown. (R. 166) Mr. Lucas admitted to having seen Ms. Brown on August 31, 1984. (R. 168) He testified that on the night in question, he called Ms. Brown on the telephone and asked that she come to his home and she replied that she would be ready to come down shortly, but needed to get cigarettes first. (R. 200, 201) Mr. Lucas testified that a few minutes later, she picked him up in her mother's automobile and they went to the gas station where they always obtained cigarettes or other supplies. (R. 201)

Thereafter, Ms. Brown dropped Mr. Lucas back home, took her mother's car home and shortly thereafter, walked back to his house. (R. 202)

He then testified that they sat in the living room where the television was and began drinking Michelob beer. (R. 202) He indicated that they both drank a large amount of alcohol since he had recently purchased two six packs of beer and some wine. (R. 202) At approximately 11:00 p.m. he had ordered a pizza to be delivered at the house and he had also prepared other food. (R. 204)

He indicated that early the following morning on September 1, they had voluntary sexual intercourse. (R. 205) He testified that in fact in the early morning hours, the couple had voluntary and mutually consensual intercourse four times. (R. 168)

Mr. Lucas' defense to this charge was consent. (R. 168) However, Mr. Lucas did acknowledge to striking Ms. Brown. (R. 205) He testified that the reason that he struck Ms. Brown was that in the act of making love, she called out another person's name, that person being Ricky. (R. 205) She also told him that she was pregnant by another man which also angered him. (R. 206)

After they had eaten and "after the sex was over, and after the slapping, we ended up going to sleep." (R. 206) He testified that after they awoke the following morning, they discussed the fact that they would not be seeing each other anymore because problems had arisen over the fact that she was seeing other men and had advised him that she was pregnant. (R. 208)

Mr. Lucas testified that Ms. Brown was worried about her "face" because it apparently had become swollen or was otherwise bruised. (R. 209) They agreed to tell her mother that she had been mugged or robbed and that she had stayed over at Mr. Lucas' home to recuperate. (R. 209) Thereafter, Mr. Lucas walked Ms. Brown home. (R. 210, 212)

Other witnesses testified as well. Dr. Michael Sampson testified that he performed a pelvic examination upon the complainant, Ms. Brown, and that examination did not reveal any lacerations or bruises. (R. 92) Dr. Sampson further indicated that there was nothing regarding his examination that would either prove or disprove that the sexual assault had occurred. (R. 93) Dr. Sampson

did indicate that Ms. Brown had some bruising around her right eye, and abrasions in the right neck area. (R. 91)

Karen Barden, a detective with the Highland Park Police Department, also testified at the trial. She stated that she arrested Mr. Lucas on September 5, 1984. (R. 140) She further testified that she obtained a knife from him and that he had given her a statement. (R. 141) Defendant's statement was in substance consistent with his testimony, both at the preliminary examination and at the trial. (R. 145) Officer Barden did acknowledge that it was at her suggestion that Ms. Brown see a physician. (R. 148)

In addition, Ms. Mary Simmons, the complainant's mother testified. However, she had no direct or first hand information regarding this incident. (R. 116-131)

At the conclusion of the testimony and after final arguments, the court found that there had been sufficient evidence to establish beyond a reasonable doubt that the defendant, Mr. Lucas, was guilty of criminal sexual conduct in the third degree. (R. 262) The difference between first degree and third degree criminal sexual conduct involves the use of a weapon, and in this matter the court found that there was not sufficient evidence to establish that a weapon had been used in connection with the act. (R. 262, 263) The court indicated that it recognized that there were inconsistencies in the testimony from the complainant, however, they were not of sufficient nature to impeach the main part of her testimony. (R. 264) Since there was no evidence of the prior long term sexual relationship of Mr. Lucas and Ms. Brown, the court did not consider that in its rejection of the defense of consent. (R. 265)

Even at the time of sentencing, the court had some reservations. The court stated:

> I hope I am not wrong, but if I am wrong, I regret it; but I think I am right and I wish that

> he would reconsider, if he could, the action taken as the court viewed it against his girl-friend or lady friend or woman friend and what she contends happened. (R. 285)

Thereafter, the court sentenced Mr. Lucas to the Michigan Department of Corrections for confinement from 44 to 180 months. (R. 285)

SUMMARY OF ARGUMENT

The Michigan Rape Shield Law requires that the defendant, through his attorney, file a motion with an offer of proof within ten (10) days of the arraignment on the information, if the defendant wishes to cross-examine the victim or present evidence to the fact finder of the prior sexual relations of the parties. In this case, a timely motion was not filed due to the negligence or inadvertence of defendant's attorney. A motion was made at the time of trial but was denied by the court because the court stated that the Rape Shield Statute precluded such a late request. It is a defendant's position that the trial court committed reversible error in imposing the preclusion sanction and not allowing him to testify in his own behalf and cross-examine the essential prosecution witness.

The Sixth and the Fourteenth Amendments guarantee a defendant the right to confront and cross-examine witnesses and the right to testify in his own behalf and present a defense. As applied in this fact situation, the Michigan Rape Shield Law deprived Defendant Lucas of these fundamental rights. While states may have procedural and statutory limitations on the scope of cross-examination and on the extent of testimony that can be presented, those rules cannot be construed so as to deprive a defendant of his fundamental rights. In such a

case, absent a showing of a compelling reason, state procedural rules must give way to the defendant's constitutional rights. In this instance, there was not a sufficient compelling reason to justify Defendant Lucas' denial of his fundamental rights.

Even where notice provisions in criminal discovery have been held to be constitutional, imposition of the preclusion sanctions have only been upheld where the actions of the defendant were deliberate or intentional in circumventing the prosecutor's case. The most that could be claimed in this case was that defendant's counsel was negligent and in such case, the defendant should not be denied his access to a fair trial for the negligent acts of his attorney.

Moreover, the trial court abused its discretion, or in fact, failed to exercise its discretion, when it imposed the preclusion sanction as to the proposed testimony instead of adjourning the trial or merely conducting an immediate *in camera* hearing. Since there were only two pertinent witnesses, the defendant and the complaining witness, both being present, there was no valid reason why a hearing on admissibility could not be held.

One of the purposes of the rape shield law is to provide notice to the prosecutor and complaining witness of the intention to probe the prior relationship. Certainly the state could not claim surprise in this case since the prior relationship of the parties had been probed in detail at the preliminary examination. In addition, since the lengthy relationship of the complainant and defendant was examined, without objection, it is unlikely that additional embarrassment would have resulted, and in any case such a claim was effectively waived.

Finally, the preclusion sanction should never bar a defendant from testifying in his own behalf. Yet, that was the effective result in this case. The precluded testimony

and cross-examination pertained to crucial facts of the case and deprived the defendant of presenting a defense. The Michigan Court of Appeals correctly concluded that this was not harmless error beyond a reasonable doubt and its ruling should be affirmed.

ARGUMENT

MR. LUCAS' RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO PRESENT A DEFENSE AND TO CONFRONT WITNESSES WERE VIOLATED WHEN RELEVANT TESTIMONY WAS EXCLUDED DUE TO A PRECLUSION SANCTION FOR THE FAILURE TO ADHERE TO THE STRICT NOTICE PROVISIONS OF THE MICHIGAN RAPE SHIELD STATUTE.

I. STATE PROCEDURAL AND STATUTORY LIMITS ON THE PRESENTATION OF EVIDENCE MUST YIELD TO THE SIXTH AMENDMENT GUARANTEE TO PRESENT A DEFENSE AND TO CROSS-EXAMINE THE WITNESS

A. A Defendant Has A Fundamental Right Under The Sixth Amendment To Present A Defense And Cross-Examine Witnesses

The constitutional right to present evidence is grounded in the confrontation and compulsory process clauses of the Sixth Amendment to the United States Constitution and the Michigan Constitution.[6]

[6] The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . The Michigan constitution provides in pertinent part, [I]n every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor . . . *Const.* Art. 1, §20

These rights are incorporated in the Fourteenth Amendment and are therefore available in state proceedings. *Pointer v. Texas*, 380 U.S. 400 (1965); *Washington v. Texas*, 388 U.S. 14 (1966). The rights guaranteed by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial. *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973). These two rights have been appropriately described as the opposite sides of the same coin, and together, they grant a defendant the constitutional right to present evidence.[7]

The confrontation clause grants a defendant the right to effective cross-examination of witnesses whose testimony is adverse. *Davis v. Alaska*, 415 U.S. 318 (1973). The compulsory process clause grants the defendant the right to admit favorable testimony in his behalf. *Chambers v. Mississippi, supra*, 295. In *Chambers*, the Court analyzed the main purpose of the Sixth Amendment, particularly as it applied to cross-examination:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process". *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *Bruton v. U.S.*, 391 U.S. 123, 135-137 (1968). It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965). Of course, the right to confront and cross-examination is not absolute and may, in appropriate cases, bow to accommodate other legitimate

[7] Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 609 (1978)

> interests in the criminal trial process, e.g. *Mancusi v. Stubbs*, 408 U.S. 204 (1972). **But its denial or significant diminuition calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined.** *Berger v. California*, 393 U.S. 314, 315 (1969) (Emphasis added)

Chambers v. Mississippi, supra at 295.

Over the years, this Court has consistently reviewed cases where state procedural or statutory rules impinge upon a defendant's rights under the Sixth Amendment. In *Chambers*, the defendant was prevented by a state evidentiary rule, known as the voucher rule, from presenting certain witnesses who could have testified that another person admitted or confessed to the crime which defendant was charged. Also, the defendant was prohibited from calling as a witness the other person who had in fact confessed to the crime. The Court in *Chambers* concluded that the testimony was critical to Chambers' defense and that in those circumstances, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be implied mechanistically to defeat the ends of justice." *Id.* 302.

In invalidating the hearsay rule as applied in *Chambers*, the Court recognized that there was an important state interest at stake. The Court noted that as a general rule, rules of evidence pertaining to the exclusion of hearsay evidence are respected and frequently applied in jury trials. *Id.* 302. However, such interests must give way when they are inconsistent with a defendant's fundamental rights guaranteed by the Sixth Amendment.

In *Davis v. Alaska, supra*, the defendant was prohibited from cross-examining a prosecution witness. The State of Alaska had a statute which prohibited the raising of a juvenile's record in court, even for the purposes of

cross-examination and impeachment. Defendant attempted to get this information before the fact finder since it would have been important to show bias and prejudice. There, the juvenile witness may have had a motivation to divert police attention away from himself, since the witness was on probation, and it was defendant's theory that he implicated defendant, to avoid being the prime suspect.

The purpose behind the Alaska statute was to protect the good character and reputation of a juvenile and to avoid embarrassment. However, the Court in *Davis* found that a witness' credibility is affected by means of cross-examination directed toward revealing possible biases, prejudice or ulterior motives of the witness as it relates to the issues of personalities in the particular case. *Id.* 316.

The Court noted that the state's aim in protecting the anonymity of juvenile offenders was admirable and important, but it concluded,

> We conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. **Whatever temporary embarrassment might result to Green (the juvenile) or his family by disclosure of his juvenile record – if the prosecution insisted on using him to make its case – is outweighed by the petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness . . .**
> The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the state cannot, consistent with the right of confrontation, require the petitioner to bear the full

> burden of vindicating the State's interest in the secrecy of juvenile criminal records. (Emphasis added)

Davis v. Alaska, supra, 319, 320.

Although the state does have an interest in promoting effective law enforcement and protecting the complainant's privacy, this interest cannot be deemed superior to Mr. Lucas' Sixth Amendment rights. Mr. Lucas' theory was that the complainant fabricated her story in retaliation for the bitter ending of their long term relationship. Without being able to explore the full prior relationship between the parties, Mr. Lucas' defense was undermined by the strict application of the notice provision of the rape shield law. Consequently, he was denied a fair trial.

B. The Defendant's Fundamental Rights To Present A Defense And Cross-Examine Witnesses Outweigh The State's Interests

Courts and legal writers agree that the *Chambers* and *Davis* decisions set forth the standard to be applied for resolving questions pitting a state's interest in evidentiary rules against a defendant's constitutional right to confront witnesses or present evidence.[8] Two views have emerged. The first view requires merely a general balancing between the state's and defendant's interest.[9]

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[8] *State v. Pulizzano,* 155 Wis. 2d 633, 456 N.W.2d 325 (1990).

[9] Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence,* Wis. L. Rev. 1219, 1256 (1985).

The second view provides that there must be a compelling state interest to overcome the defendant's constitutional rights.[10]

Recent cases decided by this Court confirm that there must be a "compelling" interest to overcome a defendant's constitutional rights, since those rights in *Chambers* and *Davis* have been described as "essential" and "vital". A general balancing test would be proper only if the state's interest, like the defendant's, were constitutionally protected.[11] More recently, this Court confirmed the important rights associated with the Sixth Amendment. In *Delaware v. Van Arsdall,* 475 U.S. 673 (1986), this Court noted that cross-examination can be limited by things such as harassment, prejudice, confusion of the issues, witness' safety or interrogation that is repetitive or marginally relevant. *Id.* 679. The Court nevertheless recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

In *Van Arsdall,* the defendant was prohibited from cross-examining a prosecution witness regarding a bargain that had been struck between the witness and the

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[10] Tanford and Bocchino, *Rape Victim Shield Laws and The Sixth Amendment,* 128 U. Pa. L. Rev. 554, 562 (1980). *See also,* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 Harv. L. Rev. at 580.

[11] *State v. Pulizzano, supra,* Note 8, at 456 N.W.2d 334. According to Professor Westen, in guaranteeing the defendant the right to produce witnesses, the framers (of the Constitution) were content to incorporate by reference whatever rules of evidence the state might fashion to govern admissibility, but intended to subject those rules to an independent constitutional standard. *See,* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, supra,* 591-593.

prosecutor in exchange for his testimony. The Court stated:

> We think that a criminal defendant states a violation of the confrontation clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a proto-typical form of bias on the part of the witness and thereby to "expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." . . . *a reasonable jury might have received a significantly different impression of [the witness'] credibility* had respondent's counsel been permitted to pursue his proposed line of cross-examination. (Emphasis added)

Delaware v. Van Arsdall, supra, at 680.

This Court recently had an opportunity to review a rape shield statute in connection with a defendant's Sixth Amendment rights. In *Olden v. Kentucky,* 488 U.S. 227 (1988), the defendant was charged with, among other things, rape. Defendant's defense was consent. His theory was that the victim had lied about the alleged rape in order to placate her boyfriend who observed her getting out of defendant's automobile. The complainant and her boyfriend were living together and defendant contended that it was crucial to his defense to be allowed to introduce that evidence. The trial court granted the prosecutor's motion *in limine* to keep such cohabitation evidence from the jury.

In a *per curiam* decision, this Court reversed the Kentucky court stating that the Kentucky Court of Appeals failed to accord the proper weight to the petitioner's Sixth Amendment right to be confronted with the witnesses against him.

Similarly, in *Crane v. Kentucky,* 476 U.S. 683 (1986), the defendant had been prohibited from testifying as to the

circumstances involving his confession, There, the trial court had concluded that the confession was voluntary. Accordingly, it determined as a matter of law that the defendant would be prohibited from testifying before the jury facts concerning the circumstances of his confession. The defendant was prohibited from testifying that he had been surrounded by police officers and badgered into making a false confession. The Court in *Crane,* in balancing the state's interest against the defendant's right to present a defense stated,

> Nonetheless, without "signaling any diminution in the respect traditionally accorded to the states in the establishment and implementation of their own criminal trial rules and procedures," we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial.

Crane v. Kentucky, supra, 690.

The *Crane* Court concluded that whether its rooted directly in the "due process clause of the Fourteenth Amendment" or the "compulsory process or confrontation clauses" of the Sixth Amendment, the Constitution guarantees that defendants shall have a meaningful opportunity to present a complete defense.

In *Rock v. Arkansas,* 483 U.S. 44 (1987), the trial court prohibited all of the defendant's hypnotized testimony because it was unreliable. Again, this Court engaged in a balancing test, weighing a state's procedural rules against the defendant's constitutional rights. There, this Court held:

> The right to testify in one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that are "essential to due process of law in a fair

> adversary process". . . . the necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include the right to be heard and to offer testimony . . .
>
> * * *
>
> . . . the right to testify is also found in the Compulsory Process Clause of the Sixth Amendment which grants a defendant the right to call witnesses in his favor . . . (citations omitted)

Rock v. Arkansas, supra, 51, 52.

When balancing the *Arkansas* per se rule excluding all hypnotically refreshed memory testimony against the defendant's constitutional right to present evidence, the Court in *Rock* stated, "[t]his is not the first time this Court has faced a constitutional challenge to a state rule, designed to insure trustworthy evidence, that interfered with the ability of a defendant to offer testimony." *Id.* 43. This Court concluded just as a state may not apply an arbitrary rule of competence to exclude a material defense witness from taking a stand, it may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony.

It is clear that where legitimate state interests have conflicted with fundamental rights of a defendant, those state interests have generally given way.[12]

Since *Chambers* and *Davis,* this Court has been applying a strict standard to apparent violations of the Sixth Amendment. The process has been described as follows:

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[12] For example, courts have held defendants rights to cross-examination so vital to a fair trial that the informer's privilege was defeated. *Roviaro v. U.S.,* 353 U.S. 53 (1957) Further, the executive privilege claim has been defeated. *United States v. Nixon,* 418 U.S. 683 (1974).

> Whether applying this strict standard overtly or in the guise of a balancing test, the court must first decide if a case implicates a particular right or prohibition contained in the Constitution. At that stage, the Court engages in a process akin to a balancing test. As the defendant seeks to avoid more than the basic evil the amendment was designed to eliminate, the court will consider the competing interests of the state. When the state demonstrates a compelling interest, the scope of the defendant's right will be more limited than in those situations in which the state has no real interest. Likewise, as the rights important to the defendant increases, it becomes harder for the state to justify the limitation on its exercise . . .
>
> Once the process of constitutional line drawing is completed, a decision that a particular practice is central to an interest protected by an amendment will be strictly enforced.

Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment,* 128 U.Pa. L. Rev. 554, 563, 564 (1980).

In the instant case, the defendant was prohibited from exposing through cross-examination, the bias or motive on the part of the complaining witness. A reasonable fact finder might have received a significantly different impression of the complainant's credibility had the defense counsel been permitted to pursue her proposed line of cross-examination. Defendant was thereby deprived of a fair trial.

II. RAPE SHIELD STATUTES – CONSTITUTIONAL ON THEIR FACE, BUT NOT AS APPLIED

The question that now must be analyzed is whether the interest sought by the state to be protected is compelling and fundamental when analyzed under the totality of the circumstances of this case.

In the past two decades, at least 48 state jurisdictions as well as the Congress and the Military have made efforts to protect rape victims from the humiliation of public disclosure of the details of their prior sexual activities. While the laws vary in scope and procedural details, they share common features of declaring an end to the presumptive admissibility of such evidence and of restricting the situations in which a defendant will be allowed to bring the victim's sexual history to the attention of the fact finder.[13] This is contrary to the common law, where such evidence was always admissible.[14]

Rape shield statutes were primarily directed against the common law use of such evidence as being "character evidence". That usage was based on the notion that women who had engaged in sexual intercourse outside of marriage had violated societal norms and, therefore, possessed the character flaw of unchastity, that is, a propensity to engage in non-marital sexual activity.[15]

Cross-examination, prior to the enactment of rape shield laws, often delved into not only the complainant's chastity, but also into matters such as the use of contraceptives, attendance at night clubs, other adulterous relationships, illegitimate offspring and other personal conduct.[16]

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[13] Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, *supra* note 10, 544.

[14] *Id.* 546.

[15] Galvin, *Shielding Rape Victims in State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763, 783 (1986).

[16] *See*, Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1 (1977).

Respondent has no quarrel with the laudatory purposes of the rape shield statute to the extent that it seeks to bar irrelevant evidence. If the evidence sought to be excluded by a rape shield statute is irrelevant, or if its probative value is substantially outweighed by its prejudice, the Sixth Amendment does not mandate its admissibility. Defendant concedes that at a criminal trial, a defendant has no constitutional right to present irrelevant, prejudicial evidence in his behalf. *Delaware v. Van Arsdall, supra*. Therefore, review of the proper scope of rape shield legislation must focus on those instances in which sexual conduct evidence would be relevant and sufficiently critical to the defense, such that the Sixth Amendment would mandate its introduction.[17]

In his survey of the rape shield statutes in the nation, Professor Galvin concluded that even the most ardent reformers have acknowledged that there is a high probative value of past sexual conduct when the defendant claims consent and establishes prior consensual sexual relations between himself and the complainant.[18] While most states, including Michigan, have held that rape shield statutes are constitutional on their face,[19] many

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[17] Galvin, *Shielding Rape Victims in State and Federal Courts: A Proposal for the Second Decade*, *supra* 806, 807.

[18] *Id.* 807.

[19] *People v. LaLone*, 432 Mich. 103, 487 N.W.2d 431 (1989), where the Michigan Supreme Court held that the rape shield law did not violate the defendant's Sixth Amendment right of confrontation where the defendant attempted to introduce evidence of the complainant's sexual history with respect to third persons. In *People v. Arenda*, 416 Mich. 1, 330 N.W.2d 814 (1982), the Michigan court again held that the rape shield

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other courts have been finding ways to avoid unjust consequences and preserve a defendant's fundamental Sixth Amendment rights by finding rape shield statutes either unconstitutional as applied or simply avoiding them altogether.[20] In response to the strict prohibitions of the rape shield law, courts have held rape shield statutes unconstitutional as applied in particular factual settings,

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statute was constitutional on its face, where, once again, the defendant sought to introduce the sexual history of the complainant as said history pertained to third parties. The Michigan court in *Arenda*, in note 7, listed numerous jurisdictions that held such statutes constitutional on their face. However, these cases involve instances of prior sexual history between the complainant and third parties.

[20] In *People v. Hackett*, 421 Mich. 338, 365 N.W.2d 120 (1984) the Michigan Supreme Court stated:

> We recognize that in certain limited situations, such evidence (prior sexual conduct) may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover, in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past. *Id.* 421 Mich. 348 (citations omitted)

Notably, none of the relevant purposes for sexual conduct evidence mentioned by the court in *Hackett* appear in the Michigan rape shield statute as an exception to the general prohibition; evidence of sexual conduct with the accused and alternative physical consequences evidence are the statute's only exceptions.

or they have engaged in the traditional balancing of the probative value against prejudicial effect.[21]

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[21] *People v. Perkins*, 424 Mich. 302, 379 N.W.2d 390 (1986) was a case similar to this matter. There, the trial court permitted the introduction of the sexual history *between the parties*. The court in *Perkins* stated:

> Because the proposed testimony in this case related to the sexual activity between the complainant and the defendant, the strong prohibitions on evidence of a complainant's past sexual activities, which we have discussed in several recent opinions, are not involved. As the statute indicates, we are faced with the more usual evidentiary issues of the materiality of the evidence to the issues in the case *and the balancing of its probative value with the danger of unfair prejudice*. . . . the critical issue at trial will be whose version of the events . . . was a correct one. . . . if a fact finder . . . were to believe the defendant's description of the encounter of the previous week, that evidence could influence his decision as to whether the events on (the date of the assault) amounted to an assault or were consensual. *Id.* 424 Mich. 307, 308. (Emphasis added)

Further, numerous state courts have held their various rape shield statutes unconstitutional as applied where the materiality or probative value of such evidence clearly outweighs the prejudicial effect, notwithstanding the prohibitions in rape shield statutes. *E.g., Commonwealth v. Black*, 47 A.2d 396 (PA. 1985), holding that the rape shield law which prohibited the demonstration by defendant of a witness' bias, interest or prejudice unconstitutionally infringed upon the defendant's right of confrontation under the Sixth Amendment; *Summitt v. State*, 697 P.2d 1374 (Nev. 1985), hoiding that defendant was denied his right to confrontation where the use of prior sexual history of the complainant was to challenge credibility; *State v. Howard*, 426 A.2d 457 (N.H. 1981) where the New Hampshire court held the defendant was denied his right to present a defense and to confront witnesses, the probative value

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The process which has developed both in Michigan and elsewhere is that courts, despite the legislative prohibitions, have concluded that evidence will be admitted based on the traditional balancing of the probative value versus prejudicial effects.[22] Courts have concluded that the underlying legislative purpose was to remove from the fact finding process the sexist and outdated notions that a woman who engages in non-marital sexual conduct for that reason alone is more likely to consent or to lie under oath.[23] The consensus both by the courts and the commentators is that relevant evidence should be admitted, subject to the traditional tests of weighing the probative value versus the prejudicial effect.

In this case, defendant was not seeking to establish that the complainant was unchaste or immoral. Rather, he was attempting to present information to the fact finder which would have put his defense of consent in the proper context. As such, the evidence was more probative than prejudicial and should have been admitted.

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outweighing the prejudicial value; *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), where the relevancy and probative value of the prior sexual conduct was material to the case and therefore constitutionally protected as to inquiry thereof.

[22] Galvin, *Shielding Rape Victims In State and Federal Courts: A Proposal For the Second Decade, supra* at 875; Tanford & Bocchino, *The Rape Shields Laws and the Sixth Amendment, supra* at 570, 571.

[23] Galvin, *Shielding Rape Victims In State and Federal Courts: A Proposal For the Second Decade, supra* at 875.

III. DESPITE COUNSEL'S FAILURE TO FILE A TIMELY NOTICE, THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED THE PRECLUSION SANCTION, PROHIBITING CROSS-EXAMINATION OF AN ESSENTIAL WITNESS AND PREVENTING DEFENDANT FROM PRESENTING AN EFFECTIVE DEFENSE

A. Notice Requirements, While Constitutional, Should Not Be Used to Preclude A Defendant From Presenting A Defense Where The Failure To File A Timely Notice Was Not Willful, Intentional Or Designed To Obtain A Tactical Advantage

Under the Michigan rape shield law, if a defendant wishes to introduce evidence of the prior sexual relationship between the parties, which is permitted under the Michigan statute, a motion (notice)[24] must be filed within

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[24] Michigan is the only state in the nation to require such an early notice requirement. Although the times can vary, generally speaking in the Wayne County Circuit and Recorder's Court, the minimum time between the arraignment on information and the trial date is two months. Other states are as follows: Ar. Stat. Ann. § 41-1810.1-2 (1977) (3 days before trial, unless good cause shown); Fed. R. Evid. 412 (motion due 15 days before trial, unless new evidence); GA. Code Ann. § 38.202.1 (Supp. 1979) (hearing any time prior to introduction); Ind. Cod. Ann.§ 35-1-32.5-1 to 3 (Burns Supp. 1978) (amended 1979) (motion due 10 days before trial, unless good cause shown); Ky. Rev. Stat. Ann. § 510.145 (Baldwin Supp. 1978) (motion due 2 days before the trial, unless good cause shown); Md. Ann. Cod. Art. 27, § 461A (Supp. 1979) (motion due any time before trial, unless good cause shown); Mass. Ann. Laws, Ch. 233, § 21B (Michie/Law Co-op Supp. 1978) (hearing before introduction of the evidence); Min. Stat. Ann. § 609.347 (West Supp. 1979) (hearing prior to trial, unless good cause shown); Mo. Ann. Stat. § 491.015 (Vernon Supp. 1979) (motion prior to the introduction of the evidence); Mont. Cod.

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ten days of the arraignment on the information.[25] The statute is silent as to the consequences of failing to file a

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Ann. § 45-5-503 (5) (1978) (motion prior to the introduction of the evidence); Neb. Rev. Stat. § 28-321 to 323 (Supp. 1978) (motion prior to introduction of evidence); N.C. Gen. Stat. § 8.58.6 (Supp. 1977) (amended 1979) (motion before or during trial); Oh. Rev. Cod. Ann. § 2907.02(D)-02(F) (page Supp. 1978) (motion at least three days before trial, unless good cause); Or. Rev. Stat. § 163.475 (1977) (motion before trial, unless good cause shown); 18 Pa. Cons. Stat. Ann. § 3104 (Purdon Supp. 1979-1980) (motion at the time of trial); S.C. Cod., § 16-3-659.1 (Supp. 1978) (motion before the introduction of said evidence); Tenn. Cod. Ann., § 40-2445 (Supp. 1978) (motion before introduction of evidence); Vt. Stat. Ann., Tit. 13, § 3255 (Supp. 1979) (motion before introduction of evidence) Wash. Rev. Cod. Ann., § 9.79.150 (1978) (motion before trial); W.Va. Cod. § 61-8B-12 (1977) (motion before introduction of evidence); Wis. Stat. Ann. § 971-31, 972.11 (West Supp. 1979-1980) (motion before trial).

[25] In Michigan, there are notice requirements in the event that a defendant wishes to raise an alibi defense or an insanity defense. MCL 768.20; MSA 28.1043 provides that the defendant shall at the time of the arraignment on the information or within 15 days after the arraignment on information, but not less than 10 days before the trial of the case, or as such other time as the court directs . . . file and serve on the prosecuting attorney a notice in writing of his intention to use the alibi defense.

MCL 768.20a; MSA 28.1043(1) provides that in the event that the defendant wishes to raise a defense of insanity or diminished capacity, a notice must be served within 30 days of trial or at such time as the court directs. Although MCL 768.21, MSA 28.1044 allows for the preclusion of such evidence or defense in the event that these time periods are not complied with, Michigan courts considering the preclusion of such evidence have held that preclusion should be exercised only in extreme circumstances, where facts clearly warrant, otherwise

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timely notice. Although this Court has not considered notice provisions of rape shield laws, it has considered notice provisions in other contexts.

Williams v. Florida, 399 U.S. 78 (1970) upheld the constitutionality of a notice requirement for an alibi defense. Several reasons were given for the rationale that the notice provision was constitutional.[26] The court in *Williams* in holding the alibi notice rule constitutional, stated that there was an important state interest in eliminating eleventh hour defenses which can be easily fabricated, that the notice requirement was reciprocal and that the Florida rule was "designed to enhance the search for the truth in the criminal trial". *Id.* 82, 83.

In *Taylor v. Illinois*, 484 U.S. 400 (1988), this Court was presented with the question of whether the preclusion sanction for the failure of the defendant to disclose a witness violated his rights under the Sixth Amendment. The Court held that although preclusion for violation of discovery rules may be justified, such preclusion can only be constitutionally justified under the most egregious circumstances.

There, the trial court precluded the testimony of a defense witness where the defendant's attorney failed to disclose that witness pursuant to a discovery order. The

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a defendant's right to present a defense will be impeded, contrary to the Sixth Amendment. *See, People v. Bennett*, 116 Mich. App. 700, 323 N.W.2d 520 (1982). Also, in *People v. Bell*, 169 Mich. App. 306, 425 N.W.2d (1988), the court held that trial courts have discretion in allowing or disallowing the evidence.

[26] The Florida statute required the defendant to file the names and addresses of any alibi witnesses with the prosecutor at least 30 days prior to trial. Fla. Rule Crim. Proc. 1.200.

Illinois Court Rule provided that upon the prosecutor's discovery request, defendant's attorney was required to, among other things, provide a list of defense witnesses. Defense counsel filed the list of witnesses well before trial, however, on the first day of trial, defense counsel was allowed to amend that list by adding the names of two other witnesses. On the second day of trial, defense counsel moved to add two more witnesses to his list by way of oral motion, and stated to the court that he had just been made aware of these witnesses.

The trial court ordered the defense counsel to bring in the witness and defendant's counsel was permitted to make an offer of proof outside the presence of the jury. This witness, as it turned out, had not been an eyewitness to the incident itself. Moreover, this witness testified that the defense counsel had visited him a week before the trial actually began, thereby, completely contradicting the representations made by defense counsel to the trial court. The trial court, in precluding the defendant's witness stated two things. First, it found that it was an intentional violation of the discovery rules. Second, the trial court questioned the value of this eleventh hour witness and seriously questioned whether he was an eyewitness at all.

This Court, contrary to the prosecutor's argument, reaffirmed a defendant's constitutional right to present a defense, which is grounded in the Sixth Amendment. The Court stated, "[w]e cannot accept the state's argument that this constitutional right may never be offended by the imposition of a discovery sanction that entirely excludes testimony of a material defense witness". *Id.*, 409.

After having determined that the defendant's rights under the Sixth Amendment can be violated by the preclusion of a material defense witness, the *Taylor* Court then turned its attention to whether facts of that case warranted a finding that defendant had been deprived of his right to present a defense. In concluding that the defendant's rights under the Sixth Amendment were not violated, this Court looked to the specific facts and stated:

> The trial judge found that the discovery violation in this case was both willful and blatant. In view of the fact that petitioner's counsel had actually interviewed Wormley (the defense witness) during the week before the trial began and the further fact that he amended his answer to discovery on the first day of trial without identifying Wormley while he did identify two actual eyewitnesses whom he did not place on the stand, **the inference that he was deliberately seeking a tactical advantage is inescapable. Regardless of whether prejudice to the prosecution could have been avoided in this particular case, it is plain that the case fits into the category of willful misconduct in which the severe sanction is appropriate.** After all, the court, as well as the prosecutor, has a vital interest in protecting the trial process from the pollution of perjured testimony. . . . the pre-trial conduct revealed by the record, *in this case* gives rise to a sufficiently strong inference that 'witnesses are being found that really weren't there' to justify the sanction of preclusion. (Emphasis added)

Taylor v. Illinois, supra, 416, 417.

The Court further noted[27] that in Illinois (as in Michigan), the sanction of preclusion is reserved only for the most extreme cases.

The Court in *Taylor* determined that the trial judge may certainly insist on an explanation for a party's failure to comply with a discovery request. The general rule that the Court set forth in light of the facts of *Taylor* is:

> If the explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to reduce rebuttal evidence, it will be entirely consistent with the purposes of the confrontation clause simply to exclude the witness' testimony. Cf. *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975)

Id., 415

Accordingly, while this Court and other state courts have upheld the preclusion sanction under certain circumstances, based on the facts in *Taylor* and the pertinent state cases, preclusion of a material defense witness can only be countenanced in the extreme case. The facts in this matter hardly arise to the extreme case as contemplated in *Taylor*.

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[27] In footnote 23 of *Taylor*, this Court observed that the Illinois courts have held that, "[t]he exclusion of evidence is a drastic measure; and the rule in civil cases limits its application to flagrant violations, where the uncooperative party demonstrates a deliberate contumacious or unwarranted disregard of the court's authority . . . the reasons for restricting the use of the exclusion sanction to only the most extreme situation are even more compelling in the case of criminal defendants, where due process requires that a defendant be permitted to offer testimony of witnesses in his defense."

B. The Trial Court Abused Its Discretion When It Concluded It Had No Choice But To Deny Defendant's Motion Because It Was Untimely

Defendant has consistently argued that the trial court abdicated its discretion when it denied defendant's motion to allow evidence and cross-examination concerning the prior sexual relationship between the complainant and himself.[28]

Defendant's trial counsel requested the trial court to permit testimony and inquiry of the prior sexual intercourse between the parties. This was done at the first day of trial. (R. 3) As Ms. Williams, defendant's newly appointed attorney, indicated, she was not the attorney of record representing the defendant when the motion should have been made. (R. 3) The prosecutor objected to the motion for the reason that the motion had to have been made within ten days of the arraignment on the information. (R. 4) Defendant's trial counsel further stated to the court that while her motion was untimely, there was little she could do, since Mr. Lucas had another attorney at the time it was appropriate to make the motion. (R. 5) The trial court inquired as to why the motion had not been made earlier, (R. 5) and reviewed the statute. The trial judge, stated that, "[l]et me check the statute. If the statute says I'm precluded from it . . . " (R. 6)

The trial court concluded that since none of the requirements of the statute had been complied with, "[u]nless this information is filed or discovered during the course of the trial, I would have to (sic) rights to go into that, but your motion is respectfully denied". (R. 6)

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[28] See Argument II, pg. 12 of Respondent's Brief in the Michigan Court of Appeals

Here, the trial court in effect stated that he was precluded from taking any further action, pursuant to the statute. However, in Michigan, a trial court always has the discretion to postpone a trial if justice requires. It is well settled that a trial judge commits reversible error if he or she does not recognize that he or she has discretion and therefore fails to exercise it. *People v. Merritt*, 396 Mich. 67, 80, 238 N.W.2d 31 (1970); *People v. Jackson*, 391 Mich. 323, 332, 217 N.W.2d 22 (1974). In *Merritt*, the court found that where a notice of alibi was filed on the first day of trial, a continuance should have been granted to avoid the preclusion of those witnesses.

The Court in *Merritt* set forth the appropriate approach that should be undertaken to determine whether the trial court abused its discretion, relying upon *Ungar v. Sarafite*, 376 U.S. 575 (1964):

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. *Avery v. Alabama*, 308 U.S. 444 [60 S.Ct. 321; 84 L. Ed. 377 (1940)]. Contrawise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Chandler v. Fretag*, 348 U.S. 3 [75 S.Ct. 1; 99 L. Ed. 4 (1954)]. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Nilva v. United States*, 352 U.S. 385 [77 S.Ct. 431; 1 L. Ed. 2d 415 (1957)]"

Id. 80, 81.

The *Merritt* court analyzed the trial court's discretion in precluding exculpatory evidence as a sanction for non-compliance with alibi notice statutes. There, the attorney failed to timely file due to illness. The court in *Merritt* found that when neither the fault of the defendant nor prejudice to the state is present, preclusion of the defendant's alibi evidence is an abuse of discretion. *Merritt, supra*, 82-83.

The court in *Merritt* applied the holding of *People v. Williams*, 386 Mich. 565, 578, 194 N.W. 2d 337 (1972) to create a four-part test for determining whether the preclusion sanction should be applied: (1) whether the defendant is asserting a constitutional right; (2) whether the defendant has standing to assert that right; (3) whether the defendant was guilty of any negligence; and (4) whether the defendant purposely engaged in any delaying tactics. *Id.*, 396 Mich. at 81. Here, as in *Merritt*, defendant's fundamental rights were at stake. Here, the defendant, himself was not negligent and clearly there is no allegation or evidence that the failure to file the notice was done deliberately or to gain some tactical advantage.

The Court in *Merritt* was consistent with *Ungar v. Sarafite, supra*, and *Taylor v. Illinois, supra*, when it concluded,

> The preclusion sanction is an extremely severe one, and the judge's discretion in exercising preclusion should be limited only to an egregious case. Clearly, it would be improper to exclude the defense where neither serious abuse of the right on the part of defendant nor prejudice to the people's case have been demonstrated.

People v. Merritt, supra, 82.

In failing to recognize that it had discretion, the trial court failed to consider two likely resolutions to the issue

which would have balanced the state's interest in receiving notice against defendant's constitutional rights. First, it could have granted an adjournment to the prosecutor, since it was the state who was objecting to the introduction of the evidence for lack of timeliness. In the alternative, the court could have conducted the *in camera* hearing the day of trial. There was no need to find and interview other witnesses, which is at least one of the reasons or purposes for the notice provision. Here, the only witness was the complainant and she was in court. The court could have easily conducted a hearing to determine admissibility. However, since the trial court failed to recognize it had that type of discretion, it committed reversible error.

C. Failure To File A Timely Notice Should Not Preclude Mr. Lucas From Testifying In His Own Behalf.

The constitutional error in this matter included the prohibition of defendant from testifying in his own case regarding material and relevant facts to his defense.[29] The rape shield law is designed to protect the victims of rape, not to prevent a defendant from testifying.

In *Alicea v. Gagnon*, 675 F.2d 919 (7th Cir. 1982) that Circuit was presented with this exact question. There, the Wisconsin trial court implemented the preclusion sanction against a defendant who did not give a timely alibi notice. The defendant was prohibited from testifying that he was at home during the time of the robbery and had received telephone calls.

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[29] Although the Government's Amicus Brief suggests that this was not raised in this matter, such is not the case. *See*, Appellant's Brief on Appeal, pages 17, 18.

The Court in *Gagnon* first noted that many commentators contend that absolutely excluding a *defendant's* alibi testimony for lack of notice should be unconstitutional.[30] After reviewing *In Re Oliver*, 333 U.S. 257 (1948)[31], *Faretta v. California*, 422 U.S. 806 (1975)[32], and the *Brooks v. Tennessee*, 406 U.S. 605 (1972)[33], the *Gagnon* court concluded that a defendant does have a constitutional right to testify by stating:

> If the search for truth is to have meaning, surely the most important figure in the controversy, whose very freedom hangs in the balance, must have a right to participate directly. We believe the fifth, sixth, and fourteenth amendments require no less. **We therefore hold that a criminal defendant has a constitutional right to testify in his own behalf under the fifth, sixth, and fourteenth amendments.** *Id.* 923. (Emphasis added)

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[30] Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 137-39 (1974); Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 711, 830-41 (1976); Note, *The Preclusion Sanction – Violation of the Constitutional Right to Present a Defense*, 81 Yale L.J. 1342, 1364 (1972). *See also*, Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 Cal. L. Rev. 1567 (1986).

[31] Certain rights are basic to our system of jurisprudence, including as a minimum the right to examine witnesses (and) to offer testimony. *Id.* 273.

[32] The Court listed a defendant's right to testify in his own behalf as one of a number of constitutional rights essential to due process of law in a fair adversary process. *Id.* 819, n. 15.

[33] The court found that whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. *Id.* 612.

The Court then considered whether the defendant's constitutional right to testify in his own behalf was impermissibly interfered with by Wisconsin's alibi-notice statute. The court closely examined the state's interests and found that the purpose of such statute was to prevent the fabrication of alibis. *Id.* 924. However, the court stated:

> But we cannot see how that interest is promoted by precluding a defendant's testimony for failure to give notice. The principal reason for notice rules, as we noted at the outset of this opinion, is prevention of surprise to the state, not punishment of the accused for mere technical errors or omissions. In this situation, it is difficult to see how the government can claim surprise. As an essential part of its case, the state must prove a defendant's presence during the commission of an alleged crime, proof which invariably requires pretrial investigation and preparation. *Id.*, 924.

Similarly, in *People v. Merritt, supra,* the Michigan Supreme Court came to the same conclusion, based upon a statutory construction analysis. The rationale for this conclusion was stated as follows:

> Defendant is already in custody, or at least available to the prosecutor. **While there may be a necessity to learn something about other witnesses who have not hitherto been available, that necessity is not present where the defendant is concerned. Should defendant suddenly develop an alibi after having told a different story, he or she may be impeached by the prosecutor.** Further, the chance that the finder of fact may not choose to believe defendant's unsubstantiated testimony is itself sufficient motivation to promote timely filing. **In any event, whether defendant was at the scene of the alleged crime would seem to be a fundamental question, and the information should reasonably be developed early in the investigation process.**

People v. Merritt, supra, 88 (Emphasis added)

Here, Lucas was prohibited from testifying as to his prior sexual relationship with the complainant. The purpose of the rape shield law is to protect the complainant, not punish the defendant. Further, as has been indicated, the prosecutor as well as the complainant had ample notice of defendant's defense from the detailed testimony elicited at the preliminary examination. To then preclude the defendant at trial from testifying to such critical facts denied him his fundamental right to testify and present a defense.

D. Mr. Lucas Should Not Be Punished For The Negligence Of His Lawyer.

Mr. Lucas argued in the Michigan Court of Appeals that he was denied effective assistance of counsel because his attorney failed to file a motion and notice permitting the inquiry into the prior sexual relationship of the parties.[34]

Unlike the facts in *Taylor v. Illinois, supra,* there is no claim that defendant's counsel in this matter intentionally, willfully or otherwise wantonly disregarded a court order or statute to gain a tactical advantage. Indeed, as suggested by the case "inquiry report", there seems to

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[34] See Argument I of Appellant's Brief in the Michigan Court of Appeals entitled, "Defendant did not receive his constitutional right to effective assistance of counsel where his trial attorney failed to timely make a motion, pursuant to the rape shield law, to seek an order permitting cross-examination of the complainant regarding the prior sexual conduct of the parties".

be some question as to whether the defendant was actually represented by counsel at the critical time. Nevertheless, had his first attorney filed a timely notice, the results of the proceeding would have been different and therefore, defendant's counsel fell below the objective standard of reasonableness, denying defendant a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984).

Here, the defendant withheld no information. On the contrary, he was forthright and was willing to take the stand, gave statements to the police and in effect, communicated with anybody who would listen. The notice requirement in Michigan requires that a written motion and offer of proof be filed with the court within ten days of the arraignment on the information. This type of legal work is out of the hands of an individual defendant. No defendant is required to know the technicalities of various time limits prescribed by statutes. Attorneys are expected to know these deadlines.

Because of his attorney's negligence, defendant was deprived of a fair trial. The remedy here, should not have been to punish the defendant by excluding his right to present a defense by cross-examining the chief witness. The remedy should have been to either adjourn the trial, or conduct an immediate *in camera* hearing at the time of trial. The punishment of defendant for the negligence of his attorney served no valid legal purpose.

IV. THE PURPOSES BEHIND THE MICHIGAN RAPE SHIELD STATUTE WERE INAPPLICABLE IN THIS CASE

A. There Was No surprise to the Prosecutor or the Complainant Regarding the Proposed Testimony

One of the purposes of the notice provision contained in any type of discovery rule is to avoid unfair surprise,

either to the prosecutor or to the witness. *Williams v. Florida, supra.*

However, here as the Michigan Court of Appeals found, there would be no issue of an eleventh hour witness since both parties were in court. The trial court would merely have to engage in the normal balancing tests when the issue presented itself.

As was stated by the Michigan court in this matter, in *People v. Lucas*, 160 Mich. App. 692, 694, 408 N.W.2d 431 (1987):

> The object behind imposition of a notice requirement is to allow the prosecution to investigate the validity of a defendant's claim so as to better prepare to combat it at trial. This rationale is sound when applied to notices of alibi and insanity defenses. It loses it logical underpinnings however when applied to the instant situation. As stated, the very nature of the evidence sought to be presented, i.e., prior instances of sexual conduct between a complainant and a defendant, is personal between the parties. As such, it does not involve a subject matter that requires further witnesses to develop. An *in camera* hearing will necessarily focus on the complainant's word against the word of a codefendant. **Requiring notice in this situation, then, would serve no useful purpose. There would be no witnesses to investigate and, thus, no necessity for preparation time. . . . this ten-day notice provision loses its constitutional validity when applied to preclude evidence of previous relations between a complainant and a defendant.** (Citing *People v. Williams*, 95 Mich. App. 1, 9-11; 289 N.W.2d 683 (1980) *rev'd on other grounds*, 416 Mich. 25 (1982)) (Emphasis added)

Here, the prosecutor was on notice from the preliminary examination, the earliest proceeding in this criminal prosecution. Mr. Lucas took the stand and gave notice

that his defense was consent, and that he and the complainant had not only consented that particular evening, but they had engaged in a consensual sexual relationship for the past six or seven months. Throughout the proceedings, Mr. Lucas continually maintained that his defense was predicated on the long term sexual relationship between the parties. By no stretch of the imagination, can the prosecutor, or for that fact the complainant, claim any surprise by the defense of Mr. Lucas at the time of trial.

B. Complainant Had Previously Been Cross-Examined As To The Prior Sexual Relationship Of The Parties, Therefore, That Underlying Purpose Of The Rape Shield Law Was No Longer Applicable

The Michigan Rape-Shield statute reflects the Michigan Legislature's determination that in the overwhelming majority of prosecutions, the introduction of the complainant's sexual conduct with the parties other than the defendant, is neither an accurate measure of the complainant's voracity nor determinative of the likelihood of consensual sexual relations with the defendant. *People v. LaLone, supra,* at 432 Mich. 125. Accordingly, the overall purpose of the rape shield law is to exclude that evidence as being irrelevant or intrusive into the private concerns of a complainant.

However, in the instant case, these very issues were examined without objection by the prosecutor at the preliminary examination. She already testified as to having sex with him. (R. Prem. Exam. 23) She already testified in the affirmative, that she had conventional as well as oral sex. (R. Prem. Exam. 23) She was already asked whether she performed fellatio on him and whether he performed cunnlingus on her. (R. Prem. Exam. 23)

These issues were previously explored in open court and it is unlikely that additional embarrassment would have resulted to the complainant. Further, the complainant could hardly claim any surprise at being asked these questions at the time of the trial, since these very questions were already asked at the preliminary examination. The protections sought by the rape shield statute in this particular case, as they pertain to the embarrassing or humiliating features of the subject matter, had in effect already been waived at the preliminary examination. Accordingly, as applied to the facts of this case, claims by the prosecutor that the complainant would have been subjected to unfair humiliation and surprise by the untimely request are not well-founded.

C. The Evidence Which Mr. Lucas Sought To Introduce And To Seek Through Cross-Examination Was Relevant And Material To His Defense And More Probative Than Prejudicial.

Although nearly all states have rape shield laws, nearly all of those that do, including Michigan, permit inquiry into the prior consensual sexual relationship between the individual parties.[35]

States have recognized that such an inquiry is more probative than prejudicial when it comes to the question of consent, when a defendant is charged with some violation of the criminal sexual conduct statute. The fact finder in this case was not allowed to hear from the complainant or defendant any information as to the degree and seriousness of the parties' prior sexual relationship. As was obviously demonstrated at the preliminary examination,

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[35] Galvin, *Shielding Rape Victims in State and Federal Courts: A Proposal for the Second Decade, supra.*

the relationship of the parties was not of a short duration or transitory affair. In addition to the numerous instances of prior sexual relations, the parties had contemplated marriage. Moreover, if the fact finder had been apprised of the complete history of the prior sexual/social relationship, then some of the other parts of the testimony would have fit more cleanly together as part of the overall puzzle. Further, it would have added credibility to the defendant's testimony at trial that the reason that the complainant was at his house was not through force but as a previously scheduled date.

Although in his brief, petitioner suggests that the judge in this matter was aware of the parties' previous sexual relationship, (Pet. Br. 88, 89) there is no evidence of this fact in the record and to come to such a conclusion, is only speculation. Indeed, the judge, at the time of rendering his decision in this matter, articulated his reasons on the record and the basis for his decision. (R. 262-266) Petitioner only speculates that the trial court knew of the parties' extensive sexual relationship; there is nothing in the record to substantiate it.

Had the fact finder been permitted to hear from the complainant or defendant the extent of the parties' sexual relationship, the impact of that evidence would have had an effect on both the credibility of the defendant as to his testimony and would have been certainly probative on the issue of consent. Defendant's theory was that the complainant had made these false allegations because a long term relationship ended. Certainly, without having the extent of that relationship known, the fact finder would be fishing without bait when it ruled on this case. The standard that must be looked to in this particular situation, is that set forth in *Olden v. Kentucky, supra,* 232, where this Court stated:

> It is plain to us that a "reasonable jury (fact finder) might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination. (citing *Delaware v. Van Arsdall* at 680)

Olden and *Van Arsdall* require examination of the excluded evidence to determine whether, presented with that evidence, a reasonable fact finder might have received a significantly different impression of a complainant's credibility or motive. Here, similarly, had the fact finder been apprised of the lengthy intimate history of these parties, a significantly different impression would have been created. *Olden* and *Van Arsdall* do not stand for the proposition that the outcome would have been different, only that a different impression would have been observed by the fact finder. The Michigan Court came to the same conclusion by holding that the error was not harmless, and that the fact finder would have had a different impression.

Here, the very essence of defendant's defense of consent was hinged upon the extensive relationship of the parties. The defendant was not seeking to introduce any evidence of sexual relationship with third parties nor was he attempting to use this evidence to establish the fact that the complainant was somehow unchaste or an immoral person. Any time a person is asked personal questions, particularly of a sexual nature, embarrassment or humiliation may occur to a normal person. Nevertheless, that is part of our jurisprudence and when comparing the unfair prejudice to the extreme probative value, the evidence must be deemed material, relevant, and

accordingly, it should have been permitted.[36] Additionally, this evidence would have been critical to defendant's theory, which was the complainant fabricated the allegations after ending a long term intimate relationship due to the fight. Without that evidence, the fact finder would justifiably find it difficult to believe or even understand defendant's theory.

V. THE ERROR COMMITTED BY THE TRIAL COURT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

Petitioner contends that if there was error in this case, such error was harmless beyond a reasonable doubt. (Pet. Br., 83-90)

This argument fails for two reasons. First, unlike *Van Arsdall*, the Michigan Court of Appeals was directed to consider that specific issue by the Michigan Supreme

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[36] MRE 403 provides, "Although relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (Emphasis added) In Michigan, as is the case in all states, trial courts are called upon in almost every trial to make decisions whether a particular piece of evidence is, although relevant, more prejudicial than probative. What the trial court was faced with in this particular situation is no different than a situation where, for instance, a prosecutor presents bloody photographs at the time of trial and defense counsel objects, claiming that they are too prejudicial. At that point, the jury is simply excused, arguments are had regarding the probative value versus prejudicial effect and ultimately a decision is made, one way or another. Here, the trial court could have simply conducted that normal inquiry, notwithstanding the purported notice requirement of the statute.

Court. When reviewing that specific question, the Michigan Court of Appeals concluded that the error was not harmless beyond a reasonable doubt, because credibility of the parties was central to the case. Accordingly, the error contributed to the verdict obtained. *Chapman v. California*, 386 U.S. 18 (1967).

In *Van Arsdall*, this Court found the Delaware Court "offered no explanation why the *Chapman* harmless error rule" was inapplicable. *Delaware v. Van Arsdall, supra* 680. In *Van Arsdall*, this Court stated the general rule in these matters to be that "[w]e believe that the determination whether the confrontation clause error in this case was harmless beyond a reasonable doubt *is best left to the Delaware Supreme Court in the first instance. Id.* 684.

Here, the Michigan Court has decided the question. Specifically, it found that the witness' testimony to be critical to the prosecutor's case. In such a circumstance, the Michigan Court correctly concluded that this error was not harmless beyond a reasonable doubt.

Second, even if this Court were to conduct an independent analysis, and not give weight to the Michigan Court's finding, the only conclusion can be that the error was not harmless beyond a reasonable doubt. In *Van Arsdall*, this Court set forth factors to be considered when determining whether error is harmless:

> These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradictory of the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecutor's case.

Id. 684.

Here, all factors point to this not being harmless error. The testimony which was sought was from the only "eyewitnesses", the complainant, and the defendant. No other witness presented at trial had any direct knowledge of the facts in this case. There was no other evidence on this point permitted, other than vague references that the defendant may have contracted a venereal disease from the complainant. However, petitioner misses the point, because the relevancy of this prior sexual history between the parties is not that they had sex once, but that it was long-term and was combined with a very serious relationship. The failure to permit cross-examination on this important point or to permit defendant even to testify as to those facts was error that clearly impacted upon the outcome of the verdict. Therefore, it can not be said that this was harmless error.

CONCLUSION

For the foregoing reasons, respondent prays that this Honorable Court affirm the Michigan Court of Appeals.

Respectfully submitted,

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